

No. 16,014

IN THE

United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

ASHBY O. STEWART, Executor of the
Last Will and Testament of Mary
W. Stewart, Deceased,
Appellee.

On Appeal from the Judgment of the United States District Court
for the Northern District of California.

REPLY BRIEF FOR THE APPELLANT.

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This reply brief is directed solely to the question of the includibility in the decedent's estate of one-half the cash surrender value of community property life insurance policies on her husband's life. Since the Government's opening brief in this case was prepared, the Supreme Court of Washington, sitting *en banc*, has held that its decision in *In re Knight's Estate*, 31 Wash. 2d 813, 199 P. 2d 89, was incorrect in holding that the cash surrender value of a life insurance

policy is not property which passes by will or by the statute of inheritance. *In re Leuthold's Estate*, Wash. 2d, 324 P. 2d 1103,¹ held that one-half of the cash surrender value of straight line insurance policies on the life of a surviving husband, premiums of which were paid out of community funds, were passed upon the death of the wife to her legatees, and therefore such value was taxable.

Because one of the decisions concerning federal income taxes, the District Court decision in the case of *Waechter v. United States*, 98 F. Supp. 960 (W.D. Wash.), is based upon the decision of *In re Knight's Estate*, and because the lower court in the case at bar has relied upon the *Waechter* case, we are setting forth some of the language of the *Leuthold* case (324 P. 2d 1103, 1106-1107):

The situation in the present case is no different than if Mr. Leuthold had taken community funds and opened a savings account with a bank in his own name. Assume, further, that at the time of his wife's death the balance in the savings account was approximately the same amount as the total cash surrender values involved in this case. Of course, it would not be contended that the wife's community one-half interest in the bank account would not be taxable on her death whether the husband had or had not exercised his right of withdrawal of the deposit at that time.

* * * * *

¹Petition for rehearing is pending in this matter. 50 Wash. 2d 869.

The precise question before us was recently decided by the court of civil appeals of Texas in *Thompson v. Calvert*, Tex. Civ. App., 301 S.W. 2d 496, 498. On a stipulation of facts substantially identical with those shown by the record in this case, the Texas court sustained the taxability, for inheritance tax purposes, of half of the cash value of life insurance policies on the husband's life when his wife predeceased him.²

In both *Thompson v. Calvert*, 301 S.W. 2d 496, and *In re Leuthold's Estate*, *supra*, the District Court opinion in *California Trust Co. v. Riddell*, 136 F. Supp. 7 (S.D. Cal.), was quoted with approval. The court in the *Leuthold* case likewise cited with approval *Estate of Carroll v. Commissioner*, 29 B.T.A. 11, where in a very similar situation one-half of the cash surrender value of life insurance policies on the surviving husband's life were included in the taxable estate of a Louisiana decedent. Both of these cases are discussed in our main brief. It is apparent that the Supreme Court of Washington has recognized that the husband may not, by the purchase of life insurance on his own life, defeat the wife's interest in

²The decision in *Thompson v. Calvert*, 301 S.W. 2d 496, is particularly interesting due to the fact that in Texas the wife has no right to proceeds of life insurance on her husband's life purchased with community property funds even though she has not acquiesced in such purchase. This is so because in Texas, unlike California, the husband can give away the community property in the absence of fraud. For a complete discussion of the community property nature of life insurance in the State of Texas, see the recent decision in *Commissioner v. Chase Nat. Bk. of N.Y., Tr.* (C.A. 5th), decided August 19, 1958 (52-2 U.S.T.C., par. 11,818, pp. 8076-8083).

the community property funds which were used to purchase such policies. The decision of the court below was incorrect and should be reversed.

Respectfully submitted,

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